

The responsibilities and obligations of the non-state actors under the International Human Rights Law

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“While engagement with non-state armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts.”

The UN Secretary-General

Introduction

The Charter of the United Nations (UN Charter) indicates that *“We the peoples of the United Nations determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person [...]”,* as well as *“to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”*.¹

The respect and protection of fundamental human rights is the key element in peacekeeping and peace-building between nations in the world. However, today one of the most biggest and serious threats to the international peace and security are the violations of human rights during armed conflicts that arise not among States, but among warring factions, such as armed non-state actors (ANSA's). The violence caused by these armed non-state actors leads to massive violations of human rights, such as: conflict-related deaths, displacement and devastation, threats to physical, sexual integrity and family life, torture, forced disappearance, the destruction of schools, hospitals and many more. For this purpose, the protection of fundamental human rights is significant in both – international and national level.

Armed non-state actors are active in most armed conflicts today and are responsible for many violations of International Human Rights Law (HRL) and International Humanitarian Law (IHL). Armed groups can either protect or harm civilians by their actions. Although, ANSA's have obligations under customary international law to respect and protect civilians²

¹ Charter of the United Nations (1945), paragraphs 2 and 3 of the preamble

² Armed groups and the protection of civilians, <http://www.geneva-academy.ch/policy-studies/ongoing/armed-non-state-actors-and-protection-of-civilians> [accessed 12 August 2014]

and can play a positive role in promoting civilian protection, not all ANSA's agree to obey to international norms and standards, as well as act in good faith regarding their commitments.

Take the latter-day situation in Ukraine. Ukraine's sovereignty, territorial integrity and independence are violated by Russia.³ Russian armed forces are engaged in direct military operations in Ukraine and the State continues to supply weapons to ANSA's, known as the Donetsk separatists, in eastern Ukraine.⁴ There is no doubt that these actions of Russia undermine the stability and security of Ukraine and causes a lot of serious violations of various International Law norms.⁵ However, there is also no doubt that not only Russia can be blamed for the unstable and dangerous situation in Ukraine.⁶

Pro-Russian Donetsk separatists should also be treated as responsible for the destruction of social and political system of Ukraine. They are responsible for hundreds of civilian casualties and violations of fundamental human rights as well. There are a lot of articles of other scholars about the responsibility and obligations of ANSA's under IHL, particularly under Common Article 3 of the 1949 Geneva Conventions (Common Article 3) and Additional Protocol II (AP II), in such situations.⁷ It is admitted that customary law provisions of Common Article 3, as well as the principles of distinction and proportionality, and the prohibition of perfidy or precaution in attack are also part of customary international law applicable to non-international armed conflicts and are then also applicable to the armed non-state groups.⁸ However, the direct applicability of HRL norms to ANSA's among scholars remains controversial.

³ Joint Statement of the NATO-Ukraine Commission, Press Release (2014) 124, Issued on 4 Sep. 2014, http://www.nato.int/cps/en/natohq/news_112695.htm [accessed 24 September 2014]

⁴ Ibidem

⁵ The Russian Federation bears significant responsibility for the violence and instability in south-eastern Ukraine, <https://www.gov.uk/government/speeches/the-russian-federation-bears-significant-responsibility-for-the-violence-and-instability-in-south-eastern-ukraine> [accessed 24 August 2014]; Ukraine must 'stop war on own people', <http://www.bbc.com/news/world-europe-27017743> [accessed 24 August 2014]

⁶ Russian troops removing ID markings 'gross violation', <http://www.theguardian.com/news/defence-and-security-blog/2014/mar/06/ukraine-gross-violation-russian-troops> [accessed 24 August 2014]

⁷ For example: Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen "International law and armed non-state actors in Afghanistan", *International Review of the Red Cross*, Volume 93 / Number 881 / March 2011, pp. 47-79; Andrew Clapham "Human rights obligations of non-state actors in conflict Situations", *International Review of the Red Cross*, Volume 88 / Issue 863 / September 2006, pp. 491 - 523

⁸ Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen "International law and armed non-state actors in Afghanistan", *International Review of the Red Cross*, Volume 93 / Number 881 / March 2011, pp. 47-79, p.62

International human rights law is designed to promote and protect human rights at the international, regional and domestic levels. The Universal Declaration of Human Rights, released on 10 December 1948, is generally agreed to be the foundation of Human Rights Law. This document represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that everyone is born free and equal in dignity and rights. Moreover, HRL lays down obligations that States, international organizations, as well as non-governmental organizations, individuals and non-state actors (also ANSA's) are bound to respect.⁹ On the one hand, as a form of international law, International Human Rights Law is primarily made up of treaties between States intended to have binding legal effect between the parties that have agreed to them, and, on the other, customary international law rules that are derived from the consistent conduct of States acting out of the belief that the law required them to act that way.¹⁰ In addition to this, being a party to the international human rights treaties rises three main duties: to respect, to protect and to fulfil fundamental human rights. The obligation to respect means that States must refrain from interfering with the enjoyment of human rights.¹¹ The obligation to protect requires States to protect individuals and groups against human rights abuses.¹² The obligation to fulfil means that States must take positive action to facilitate the enjoyment of fundamental human rights¹³ (especially the right to life, health, freedom of speech, freedom of movement, education). Therefore, through ratification of the international human rights treaties, States make sure that their legislation is compatible with their treaty duties and obligations. However, when domestic legal proceedings fail to address human rights abuses, States are held responsible for failure to protect fundamental human rights and are bound by HRL to change the existing situation and act in good faith regarding their treaty commitments.

⁹ The foundation of International Human Rights Law, http://www.un.org/en/documents/udhr/hr_law.shtml [accessed 24 August 2014]

¹⁰ International Human Rights Law, <http://www.ohchr.org/en/professionalinterest/pages/internationalallaw.aspx> [accessed 24 August 2014]

¹¹ The foundation of International Human Rights Law, http://www.un.org/en/documents/udhr/hr_law.shtml [accessed 24 August 2014]

¹² Ibidem

¹³ Ibidem

What regards non-state actors (NSA's), especially ANSA's, their legal status concerning the direct obligations and responsibility under HRL is vague. Some scholars¹⁴ indicate that HRL cannot be applicable to the non-state actors, for several reasons. Firstly, HRL regulates the behavior of the States and not of private actors. Secondly, there are only few international human rights treaties that explicitly mention duties that ANSA's might be bound by.¹⁵ Though, the situation is evolving and now it is admitted that not only IHL, but also HRL is important in order to promote compliance with international law norms by ANSA's. Nowadays, non-state actors play an important role in the protection and development of the fundamental human rights and share this power with the States (or international organizations). For this purpose, the main focus of this master thesis is on the possibility to apply Human Rights Law norms to NSA's (including ANSA's) through the participatory rights in the law-making in the international legal system, as well as through the States parties of particular human rights treaties.

Considering the limitations on the length of this master thesis, I will not discuss the problems of defining non-state actors, the obligations of non-state actors under international customary law, as well as the responsibility of non-state actors under IHL as a comparison to the responsibility under HRL. Moreover, the term "non-state actor" refers to all actors operating at national or transnational level, such as: individuals, armed groups (including insurrectional movements) and other organized entities. In addition, the main questions of this thesis are: whether human rights obligations can be applicable to the non-state actors through the international human rights treaties that are ratified by the States, and how to apply these human rights obligations that has the State to the non-state actors that are acting in the State's territory.

The structure of master thesis which seeks to explore the issue of applicability of HRL obligations to the non-state actors is consequent. As to the first chapter, it discusses the problem of defining legal status of the non-state actors in the International Law. International law no longer regulates the rights and obligations only of the States. The non-state actors also play an important role in the international relationship nowadays. International legal personality is all about the ability to have rights and obligations under International Law.

¹⁴ For example: Liesbeth Zegveld "The Accountability of Armed Opposition Groups in International Law", Cambridge University Press, 2002

¹⁵ Ibidem

However, the non-state actors are neither States nor state-empowered bodies. Therefore, Chapter I analyses the ability of the non-state actors to have direct rights and obligations on their own, as well as their status in the international legal system on the whole. In order to make such analysis, various conceptions of international legal personality will be presented and the influence on the status of NSA's that those conceptions have will be discussed.

Chapter II considers the possibility of application of HRL obligations to the non-state actors. Today, NSA's are recognized to be a part of International Law. In other words, International Law no longer is state-centric. Yet the question of the role of the non-state actors in the creation of the International Law norms and standards remains highly controversial. There exists a problem of participation of the non-state actors during the creation of international duties to them. International obligations to NSA's are composed by the States and usually without consent of the NSA's. For this reason, Chapter II is divided into several sets of questions, regarding, firstly, the creation of rights and obligations to the non-state actors and their possible role in creating International Law norms from where their international obligations rise, and secondly, the obligations of NSA's under HRL that rises from HRL norms and from the legitimate expectations of the international community on the whole.

Chapter III will consider the issue of the direct responsibility of the non-state actors for human rights violations and the possibility to apply the responsibility to the non-state actors under HRL through the State's obligations under HRL.

This master thesis will use social science methodology to answer and discuss the questions stated above. There are logical and systematic method used for summation and conclusions. For given examples and analysis is used periphrastic method is used. Besides that, teleological and comparative methods are also used. The main sources of this master thesis are law publications, international treaties, conventions, United Nations documents and the general comments of Human Rights bodies. The example of Donetsk separatists, acting in the eastern Ukraine, is used to illustrate what influence ANSA's have on the protection and at the same time on the violations of fundamental human rights, and the reluctance of the States to acknowledge that ANSA's could operate in ways which are akin to governments.

1. Chapter I: International legal personality of the non-state actors

1.1. Conceptions of International legal personality and their impact of the international status of the non-state actors:

International legal personality (ILP) is a controversial notion of the International Law. As Roland Portmann indicates, personality in the International Law “[...] tends to be a relatively philosophical and at times abstract topic”. The author also indicates that the concept of ILP is “[...] closely related to the nature and purpose of international law in general”.¹⁶ Indeed, there is no clearly established international law of persons. That is, legal personality is the status which enables an entity to function in a legal order¹⁷ - to have certain rights and duties under the International Law, as well as to be able to invoke international responsibility and to be held internationally responsible. However, there are different positions among scholars and international lawyers on exactly which entities count as persons in the International Law, as well as under what criteria personality is acquired and what specific consequences this status entails.

Furthermore, there are different opinions on what international legal personality is and what the subjects of the International Law are. For this purpose, the different approach to the concept of legal personality may have a big influence whether NSA's are (or should be) recognized as a subject of the International Law, as well as having ILP. There can be several positions on the subjects of the International Law distinguished¹⁸:

1. States-only: this position indicates that only States have international personality;
2. Recognition: the second position recognizes that other entities can also purchase international legal personality;
3. Individualistic: this position states that individuals may also be subjects of the International Law;
4. Formal: the fourth position declares the International Law as an open system;

¹⁶ Roland Portmann “Legal Personality in International Law”, Cambridge University Press, 2013, p.10

¹⁷ Janne E. Nijman “Non-State Actors and the International Rule of Law: Revisiting the “Realist Theory” of International Legal Personality” in “Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers”, ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 91-124, p. 93

¹⁸ Roland Portmann “Legal Personality in International Law”, Cambridge University Press, 2013, p. 13-18

5. Actor: the fifth position stipulates a presumption that all effective actors of international relations are relevant for the international legal system.

1.1. Under States-only conception NSA's are seemed as not directly relevant for the International Law.¹⁹ In other words, the International Law is coherent as a relationship only between the States. It is the traditional subject doctrine which is criticized nowadays. The view that the international community consists only of the States and that only the States have international rights under the International Law and can be bound by this law is incorrect.²⁰ The importance of the role of NSA's in the international plane is rising.²¹ Indeed, more and more scholars²² admit that the recognition of NSA's as having ILP is significant in development of and compliance with the International Law norms today.

2.2. Although this position indicates that States are still the original international legal persons of the International Law, it also acknowledges that other entities can have certain international rights and duties analogous to those of States, if those entities are recognized by those States.²³ This is usually how the new States gain international rights and duties, as well as the status of ILP. This also means that by this kind of procedure the States can alike recognize NSA's. Though, Roland Portmann indicates that in order for the non-state actors to gain the status of international subject (as well as the possibility to bear international rights and obligations) there must be a recognition none the less of two States, because there is a presumption that NSA's "*[...] naturally belong to the municipal, and not to the international, legal order*" and, therefore, "*[...] the act of recognition as an international person has to be in more unequivocal terms than is the case with the recognition of states*".²⁴ The recognition may be explicit or by clear implication. Thus, at the same time, the recognition of the non-state actors is seen controversial by the States. For this reason, the possibility to require NSA's

¹⁹ Ibidem, p. 13-18

²⁰ Ibidem, p. 13-18

²¹ The role of Non-State Actors in International Relations, http://www.academia.edu/5124220/The_Role_of_Non-state_Actors_in_International_Relations [accessed 24 August 2014]

²² For example, Andrea Bianchi "The Fight for Inclusion: Non-State Actors and International Law" in "From Bilateralism to Community Interest: Essays in Honour of Bruno Simma", Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder, 2011, pp. 1-21; Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen "International law and armed non-state actors in Afghanistan", International Review of the Red Cross, Volume 93 / Number 881 / March 2011, pp. 47-79

²³ Roland Portmann "Legal Personality in International Law", Cambridge University Press, 2013, p.80

²⁴ Ibidem, p. 82

to obey international rules and standards, and to find them responsible for the breaches of the international norms is aggravated.²⁵

3.3. The third position states a presumption that States and various other entities can be international persons, if there are international norms addressing them.²⁶ Nowadays it is admitted that the individuals as the States and the international organizations should be treated as the subjects of the International Law and as having the ILP.²⁷ Moreover, individuals are held internationally responsible for the violations of the fundamental international norms no matter, if they were acting as the agent of the State or as a private actor. What regards NSA's, there could also be a possibility to apply this conception from the perspective that NSA's too consists of individuals (groups of individuals).²⁸ That is, individuals as the members of the NSA's could be held responsible for the violations of the international rules. This is possible under the International Criminal Law (ICL). However, it would be hard to use this individualistic conception concerning HRL, because there is no international recognition that NSA's have certain rights and duties under HRL, and now to lean only to the presumption that the members of NSA's are also individuals would be too vague, therefore this question will be discussed wider in the next chapter.

4.4. This conception indicates that every entity may be an international person.²⁹ That is, the international legal system is being seen as open to everyone and that the creation and development of the international norms do not rest on having a status of international legal personality.³⁰ International legal person is a person to whom international legal system has vested rights, obligations and responsibilities³¹, in other words – personality is not a precondition, but the consequence of ability to possess international rights and duties. Therefore, there can be made a presumption that NSA's can also be treated as having ILP, because they do have certain obligations and responsibilities under International Law (e.g. it is recognized that NSA's, especially ANSA's, can be held responsible for the violations of the

²⁵ The estimation of the author of the Master Thesis

²⁶ Roland Portmann "Legal Personality in International Law", Cambridge University Press, 2013, p. 126

²⁷ Ibidem, p. 13-18

²⁸ The estimation of the author of the Master Thesis

²⁹ Roland Portmann "Legal Personality in International Law", Cambridge University Press, 2013, p. 173

³⁰ Ibidem, p. 13-18

³¹ Hans Kelsen "General Theory of Law and State", Harvard University Press, 1945, p. 99

fundamental international humanitarian norms under IHL and ICL). This conception will also be discussed broader latter on concerning the rights and obligations of the NSA's under HRL.

5.5. According to this (Actor) conception, international legal persons are those who have factual power in decision-making process during which certain rights and duties rises to these persons.³² This means that decision-making process determines international rights and obligations of those, who participate in that process. For this purpose, the actor conception suggests that the phrases “actor” or “participant” should be used instead of “ILP”, because all those who participate in the development of international legal system are international persons.³³ Therefore, now the question rises, whether NSA's are the law-makers or more the law-takers? Traditionally international legal system do not include (neither theoretically nor conceptually) NSA's in its law-making procedures.³⁴ However, it can also not be denied that NSA's have a great influence on international decision-making – the acts and solutions of the non-state actors have the impact on the State's policy and practice, as well as on the safety of civilians and on the maintenance of international peace on the whole.³⁵ Thus, NSA's could (in principle) be treated as participants (subject) of international law, just in a “lower” sense, i.e. NSA's could be considered as participants of the International Law that have the influence not on the law-making procedure, but in the law-making process and, at the same time, as having certain international rights, duties and responsibilities.³⁶

To review what has been mentioned above, there are various opinions and, at the same time, modifications of these presented conception in the international legal reasoning. These conceptions have developed through the history, but they are relevant today as well. By analyzing five different positions on ILP, it can be seen, how the status and the importance of NSA's has changed. It follows that ILP of the NSA's, nowadays, should be understood according to Individualistic and Formal conceptions, because these positions present and suggest wider interpretation of the status of the NSA's as subjects in the international legal

³² Roland Portmann “Legal Personality in International Law”, Cambridge University Press, 2013, p. 14

³³ Ibidem, p. 13-18

³⁴ Math Noortmann and Cedric Ryngaert “Non-State Actors: Law-Takers or Law-Makers? Is That the Question?” in “Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers”, ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 194-202, p. 198

³⁵ The estimation of the author of the Master Thesis

³⁶ The estimation of the author of the Master Thesis

system.³⁷ However, the state-centric view still prevails and this view still aggravates the possibility for the NSA's to participate fully in the international legal plane as the subjects of the International Law and, again, aggravates the possibility to impose direct obligations and responsibility under HRL on them.

1.2. The status of the non-state actors in the International Law:

As it can be seen from the previous section, there are no clear criteria under which ILP and the status of the NSA's as subjects of the International Law could be determined. Furthermore, under the traditional subject doctrine, which still prevails in the international legal reasoning, the International Law is based on the rules made by the States for the States and that only the States have ILP as they are the bearers of the international rights and obligations, as well as they have international law-making and law enforcement powers.³⁸

In fact, International Court of Justice (ICJ) in its Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations Case (Reparation for Injuries Opinion) indicated that being an international legal person *"It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims"*.³⁹ In other words, International legal personality includes the capacity to enforce one's own rights and to compel other subjects to perform their duties under the International Law. Therefore, it can be said that a subject of the International Law should be able to⁴⁰:

1. Bring claims before international and national courts and tribunals to enforce their rights;
2. Have the ability or power to come into agreements that are binding under the International Law;

³⁷ The estimation of the author of the Master Thesis

³⁸ Philip Alston "Non-State Actors and Human Rights", Oxford: Oxford University Press, 2005, p. 70

³⁹ Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations Case, ICJ, 1949

⁴⁰ Ruwanthika Gunaratne "Who is a Subject of International Law", <http://ruwanthikagunaratne.wordpress.com/2011/03/26/1-2-an-introduction-to-subjects-of-international-law/> [accessed 12 August 2014]

3. Enjoy immunity from the jurisdiction of foreign courts;
4. Be subject to obligations under the International Law.

However, the definition of ILP given by the ICJ in its Reparation for Injuries Opinion is rather uncertain. That is, the Court does not clearly indicate which entities actually are (or should be considered as) international legal persons and also the Court does not mention any specific criteria under which the status of the entity as a subject of the International Law would be apparent.⁴¹ Still, the given definition of ILP indicates that ILP is being created by the international legal system when this system addresses the entity through an international norm and standards which, as a result, creates rights, obligations and certain responsibility to that entity.⁴² In the same vein, this also means that there is a possibility to include NSA's as the subjects of the International Law, if international situation so requires (“[...] subjects [...] nature depends upon the needs of the community”⁴³).

Indeed, the ICJ has widened the scope of the traditional theory of subjects.⁴⁴ That is, the ICJ in Reparation for Injuries Opinion has noted that: “*The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States*”.⁴⁵ Indeed, the subjects of the International Law do not all have the same rights, duties and capacities. For this purpose, non-state actors, like the States, individuals, international organizations and etc., could in principle be regarded as a subject of the International Law that possibly have certain international rights and obligations.

Additionally, concerning the status of the NSA's in the International Law, NSA's can be defined very simply, as the definition of these actors is in their name, – a group of actors composed of all actors that are not States. This definition is wide and includes individuals, as

⁴¹ Roland Portmann “Legal Personality in International Law”, Cambridge University Press, 2013, p. 10

⁴² Ibidem, p. 10

⁴³ Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations Case, ICJ, 1949

⁴⁴ Andrea Bianchi “The Fight for Inclusion: Non-State Actors and International Law” in “From Bilateralism to Community Interest: Essays in Honour of Bruno Simma”, Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder, 2011, pp. 1-21, p. 3

⁴⁵ Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations Case, ICJ, 1949

well as the groups of individuals. Boyle's exemplary list of possible non-state actors illustrates a very good point on how miscellaneous the definition of NSA's is. The author stated that *"non-state actors today encompass inter alia sub-state entities and denied statehood, national and international issued-based NGO's, individuals, "kitchen-tables", the corporate and business sector, shareholders, churches and religious groupings, trade unions and employees, academics, think tanks, consumer groups, para-military forces, professional associations, including those of judges, lawyers, parliamentarians and law enforcement agencies, expert communities, sport associations and criminal terrorist associations"*.⁴⁶ Or to put it more simply – the NSA's are the actors that do not possess the authority and the power of the State and its organs.⁴⁷ Although, today, NSA's are increasingly being treated as possibly bearing some international rights and duties as States and other recognized subjects of International Law.

However, NSA's are still not considered to be subjects, but objects of the International Law.⁴⁸ And yet, this view does not demonstrate the clear position and status that NSA's have nowadays. Of course, it can not also be denied that NSA's depends greatly on the States and their law-making powers, such as recognition of a new subject of the International Law.

The other reason why NSA's are treated as objects of the International Law lies in their own negative term – *non-state actors*. Philip Alston calls this "The "Not-A-Cat" syndrome" and states that this kind of negative term *"do not stem from language inadequacies but instead have been internationally adopted in order to reinforce the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve"*⁴⁹ and this means that other entities in the International Law can *"only be identified in terms of their relationship to the State"*.⁵⁰ According to this author's view, subjects in the international legal system are then divided in two categories: states and not-states. This, again, means that other entities can become subjects of the International Law and

⁴⁶ Alan Boyle and Christine Chinkin "The Making of International Law", Oxford: Oxford University Press, 2007, p. 44

⁴⁷ Neomi Gal-Or "Observations on the Desirability of an Enhanced International Legal Status of the Non-State Actor" in "Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers", ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 125-149, p. 130

⁴⁸ Janne E. Nijman "Non-State Actors and the International Rule of Law: Revisiting the "Realist Theory" of International Legal Personality" in "Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers", ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 91-124, p. 93

⁴⁹ Philip Alston "Non-State Actors and Human Rights", Oxford: Oxford University Press, 2005, p. 3

⁵⁰ Ibidem, p. 4

gain ILP, but, with the prevailing traditional view to what are (or should be) the subjects of the International Law, those other entities would need to look very similar to the States in order to meet the requirements of ILP⁵¹ (to be capable of possessing international rights and duties, and bringing international claims). In addition, this is true concerning the status of the NSA's in the international legal system. States are looking skeptical to a possibility to recognize NSA's as the subjects having ILP, as well as there are no clear international legal documents that would define straight the rights, obligations and responsibilities of the NSA's and their role in the international plane on the whole (e.g. there is no convention on the law of ILP or NSA's). For this reason, the status of the NSA's in the International Law is vague, although non-state actors do participate in and do have an impact on the international legal processes and, therefore, NSA's should be presumed to have a duty to conform with international legal obligations, especially what regards the protection of the fundamental human rights.⁵² On the whole, the emphasis should be put more not on the notion of "subject" or "ILP", but on the obligations and direct responsibility of the NSA's for the violations of the International Law norms. In other words, if there is an acknowledgement that NSA's do actually participate in the international legal system, there should also be international legal norms that would clearly indicate their role in the international legal process as there are norms that define the role and obligations, as well as responsibility of the States (e.g. Draft Articles on the Responsibility of States for Internationally Wrongful Acts) and other international subjects (e.g. Draft Articles on the Responsibility of International Organizations).⁵³ Of course, this may cause several problems: firstly, there can be reduced level of responsibility of the State to ensure compliance of other actors with international obligations, and, secondly, direct applicability of the responsibility to the NSA's for the violations of the international norms might not be as powerful as direct responsibility of the States, yet, the respect of the international norms that are a fundamental value to the whole international community and responsibility for the violation of such norms should be owed by all actors, regardless of whether they are States or NSA's. For this purpose, NSA's as being capable to participate in the international legal process they should also have a right to such participation and the responsibility of their own actions.

⁵¹ Ibidem, p. 20

⁵² The estimation of the author of the Master Thesis

⁵³ The estimation of the author of the Master Thesis

Eventually, it can be said that:

1. Growing influence of the NSA's in the international legal process raises the need of redefining the boundaries of the international legal system concerning the ability to participate in the international plane for the other entities, such as NSA's, because the International Law can no longer be so static and state-centric in the XXI century;
2. The vague status of the NSA's leads to the conclusion that the traditional subjects doctrine is no longer able to provide a satisfactory account of the social realities underlying the International Law;
3. There is the need to rethink and refresh the fundamental tenets of the international law theory, including the doctrine of subjects, and to put more efforts on the development of the direct rights, duties and responsibilities of NSA's that the States would no longer be the only ones responsible for the violations of the international legal norms.

2. Chapter II: Human Rights Law applicability to the non-state actors

2.1. Creating rights and obligations for the non-state actors:

As it was argued in the first chapter, the non-state actors should be recognized as a general category of an actor (participant) of the International Law to which a basic set of international rights and obligations applies. Moreover, it should be also recognized that granting the status of international legal personality to the NSA's has an impact on the development of the International Law rules and standards, as well as an impact on the implementation and more importantly on the compliance with international rule of law by the NSA's, which is highly important to the whole international community. Nevertheless, the role of the NSA's in the process of the creation of the International Law norms is contentious. On the one hand, International Law is no longer seen as regulating international rights and duties only among States. On the other hand, the traditional subject doctrine still prevails and the International Law is still more state-centric than open to the view that other actors, such as NSA's, are having more and more influence on the international community. Therefore, this chapter discusses, firstly, the creation of international rights and obligations of the NSA's, secondly, the participation of NSA's in the creation of such rights and duties, as well as possible advantages and disadvantages of such participation, and finally, what obligations the NSA's have under Human Rights Law.

To begin with, there is a general acknowledgement that there must be consent of the subject in order to create certain rights and obligations for that subject. In other words, being international legal personality means not only that a subject has certain international rights and obligations, but also that that this subject has those rights and obligations to the extent that it has given its consent to enjoy those rights and be bound by those duties. However, duties under International Law for the NSA's are still being created without NSA's consent. Of course, what regards protecting the basic values of the international community and what regards *jus cogens* norms, there is no need of consent of the subject in such situations, i.e. to the extent that certain international norms could be considered as the most basic values of the international community, those norms could be imposed on NSA's without their explicit

consent.⁵⁴ But still, on the one hand, the question rises: can the rules be treated as legitimate, if they are imposed to the subjects without their consent? On the other hand, could such participation of the NSA's in the law-creation process mean that NSA's should be treated alike to the States, concerning the possession of and bounds of international rights and duties? Also, if it would be acknowledged that NSA's actually play an important role in the international law-making process, should then NSA's be treated as law-makers or law-takers, or maybe law-consumers?

The determination of the precise role of NSA's in the international law-making process is problematic. That is, NSA's, especially ANSA's, are being required to comply with international norms, while NSA's are not included in establishment of such norms, although their (NSA's) role in the implementation of those norms is considered to be very important. The other problem, that aggravates the acknowledgement of NSA's role in the law-making process, is that NSA's are neither States (with direct law-making powers) nor entities that are created and empowered by the States (with delegated law-making powers).⁵⁵

Robert McCorquodale argues that a subject of the International Law can be considered to be the one that has direct rights and duties (as well as responsibilities) under international legal system, can bring international claims and “[...] is able to participate in the creation, development, and enforcement of international law”.⁵⁶ This view suggests NSA's (including ANSA's) having the law-making role alongside States in the international legal system. In other words, NSA's as having certain international rights and duties are also considered to be participants in law-making process, because rights and especially obligations can not be imposed on the subject without that subject's awareness. This means that in order for the NSA's to be governed by the international legal norms, NSA's should have an opportunity of participation in the making of such norms. Though, such NSA's participation is problematic, especially regarding the creation of HRL norms.

⁵⁴ Cedric Ryngaert “Imposing International Duties on Non-State Actors and the Legitimacy of International Law” in “Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers”, ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 69-89, p. 70

⁵⁵ Anthea Roberts and Sandesh Sivakumaran “Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law”, The Yale Journal of International Law / Vol. 37/ Issue 01/ 2011, pp. 107-152, p. 118

⁵⁶ Robert McCorquodale “An Inclusive International Legal System”, Leiden Journal of International Law / Volume 17 / Issue 03 / 2004, pp. 477-504, p. 307

By signing and ratifying human rights treaties States usually create state-to-state duties. Those duties are to protect, respect and fulfil human rights. Furthermore, States under human rights treaties acknowledge and guarantee human rights to individuals (that are NSA's) and at the same time maintain and secure those rights from violations by another States. Meanwhile, NSA's have a right to have those rights that are guaranteed by the State. This means that international human rights treaties do not create rights to NSA's under international legal system, but rather create obligations for the State parties to secure and develop human rights. However, this does not mean that, as a result, NSA's do not have possibility to participate in the development of human rights norms. Human right treaties and conventions include procedural rights for the NSA's (for example, the right to petition) and by granting such procedural rights to the NSA's States recognize the importance of the NSA's role in the international legal system and most importantly by granting those procedural rights States have: firstly, created international rights for NSA's and secondly, an international legal personality of NSA's.⁵⁷ In other words, by granting ILP for NSA's, NSA's not only have been given international rights and obligations, but also the possibility to have an import role in the law-making process of international legal norms by which NSA's like States are bound and should give consent to be bound by those norms.

Additionally, if States create international obligations for the NSA's without their consent, the legitimacy of those obligations becomes controversial.⁵⁸ Therefore, in order to ground the binding character of the International Law for NSA's, there must be proved that either: firstly, the process of creation of such international duties is just (i.e. implies that the NSA's have at least at some extent participated in the creation of those international norms) or secondly, the legal norm or its implementation has in itself an important value for the international community⁵⁹ and this creates the duty for NSA's to uphold that value. In the same vein, the members of the international community have the right to demand from the NSA's to act in the same way regarding the protection of fundamental values of the international legal system as the rest subjects of the International Law. Additionally, the demand of protecting international values makes NSA's a part of the international community,

⁵⁷ Cedric Ryngaert "Imposing International Duties on Non-State Actors and the Legitimacy of International Law" in "Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers", ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 69-89, p. 71

⁵⁸ Ibidem, p. 71

⁵⁹ Ibidem, p. 71

as well as a part of the international legal norms creation process. In other words, by having a duty and being affected by that duty, NSA's should be allowed to participate in the development of such duty and to influence the content of the norm from which that duty rises. Only then the creation of international rights and obligations for NSA's could be treated as legitimate.⁶⁰

NSA's, depending on their status (for example, ANSA's), could be given the possibility to participate in the international law-making process in certain ways. For example:

1. The bilateral agreements between States and NSA's;
2. NSA's having control over territory in the State;
3. NSA's as bearers of the international rights and duties;
4. Through the international treaties that are signed and ratified by the States;
5. Through the basic values of the international community.

1.1. One way of NSA's involvement in the law-making process could be when the States enter into bilateral agreements with the NSA's. Such agreements could also be made with armed groups during non-international armed conflicts. Although this kind of involvement would still depend more on State's consent to grant NSA a role in negotiations on certain commitments that rise from the agreement, the main point would be that NSA's would be given a possibility to participate in legal norms creation to that extent that they (NSA's) have entered into the international agreement and, as a result, are bound by that agreement. In other words, legal norms of such bilateral agreements would be treated as legitimate, because NSA's had a possibility to participate in the creation of those norms from which certain international obligations for NSA's rises. In addition, by this it would be acknowledged that NSA's has a role (although limited) in the development of the international legal system.

2.2. NSA's that have control over the State's territory (or part of the territory) or/and exercise governmental functions could also be seen as having role in the law-creation process. That is, such NSA's (like States) enter into legal agreement with the States, as well as other

⁶⁰ Article 35 of the Vienna Convention on the Law of Treaties also indicates that: *"An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing"*. This can as well be said about international legal agreements (treaties) that create international obligations to such actors of the international community as NSA's. That is, States by signing international human rights treaties not only take the obligation to ensure and secure fundamental human rights, but at the same time create the obligations for the bearers of those human rights – NSA's – to respect and value international human rights norms, and NSA's accept such obligations by giving their consent.

NSA's and by doing that such NSA's participates in the development of the international legal system. Furthermore, States have signed peace agreements with NSA's (i.e. ANSA's) that exercise control over the territory. Such ANSA's have also signed agreements with each other. Therefore, considering that these kind of agreements are often characterized as treaties⁶¹, it can be said that NSA's do participate in the creation of the international legal norms.

3.3. NSA's as ILP have certain rights and obligations under the International Law. The creation of rights for such actors needs no justification, however, imposition of international duties that have direct effect to NSA's need to be made with the awareness of such actors. That is, NSA's should have a possibility to participate in the law-creation process at least what regards the international obligations that are (or may become) binding on NSA's. Otherwise, such norms that impose direct duties on NSA's without their consent would be illegitimate.

4.4. Although international treaties are usually signed between the States and those treaties usually create state-to-state obligations, the norms of the international treaties also have affect on the other international community members, as well as on the NSA's. Additionally, international treaties, particularly international human rights treaties, do not impose direct obligations on the NSA's. On the contrary, human rights treaties impose direct international duties on the States that are parties to those treaties. Yet, international human rights treaty's norms are implemented through the State's national legal system. In other words, while international treaties impose only indirect international duties on the NSA's and direct international duties on the States, NSA's are affected when the norms of those international human rights treaties are being implemented at the national legal level. This means that, when there is a slight possibility for the NSA's to be involved in HRL norms creation at the international level (especially for the ANSA's), NSA's should be involved in the implementation of such norms at the national level, because those norms have the direct impact on the NSA's within the territory of the State that is a party to the particular international human rights treaty, which norms are followed in the State. Therefore, the ignorance of the possible role of NSA's in the implementation of HRL norms at the national level may raise the question of the legitimacy of direct imposition of such norms on NSA's.

⁶¹ Anthea Roberts and Sandesh Sivakumaran "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law", *The Yale Journal of International Law* / Vol. 37/ Issue 01/ 2011, pp. 107-152, p. 121

5.5. All the international norms, standards and values should be developed considering the needs of the whole international community. NSA's are the members of the international community just like States, international organizations and etc. For this purpose, NSA's should be involved in the international law-making process as other subjects of the International Law are. NSA's actions and decisions have an effect on the development and the implementation of the international legal norms, as well as the protection of the basic international values. By the acknowledgement of such important role of the NSA's in the international legal system, international duties should not be imposed on such international actors without their consent. In other words, there should not be a demand for NSA's to obey international norms and to protect international values, when NSA's have not been given a possibility to have the influence on the creation of such norms and values.

Regarding what have been mention before, there could be a lot off ways, how to involve NSA's in the international law-making process, but the rationale of such involvement is based not only on the importance of the bestowal of participatory right in such law-making process, but on the effectiveness of the regulation and the responsibility (accountability) of the international community member in case of the violation of the international norms, especially human rights norms. For this reason, there could be possible advantages and disadvantages of the involvement of the NSA's in the international law-making process.

Considering the advantages of the possibility for NSA's to participate in the creation of the international legal system, it can be said that:

1. First of all, the participatory rights of the NSA's in the international law-making process mean that NSA's can be held responsible for the trespass of the international obligations, in which creation they have been participating. Moreover, regarding the fact that most NSA's, especially ANSA's, do not consider themselves bound by particular international rules usually because they (NSA's) did not participate in the creation of such rules, it can be said that granting participatory rights to NSA's (including ANSA's, because precisely these non-state actors cause the most problems, concerning the compliance with international norms and standards) would strengthen and increase the compliance with international rules by NSA's. Indeed, the involvement in the

law-creation process promotes a sense of “ownership” over the norms.⁶² That is, when NSA’s are being involved in the making of the law, they can be considered to have internalized that law⁶³ and, as a result, NSA’s could not justify their non-compliance with their international duties on the ground of lack of legitimacy of the norms that have created those obligations for them. Therefore, it can be said that the higher number of various groups interests are taken into account, the greater is the chance to limit possible violations of the International Law norms, especially considering the development and the protection of the fundamental human rights and the needs of the international community on the whole.

2. The next possible advantage is relevant to armed non-state actors. The main intention is that allowing armed groups to give their consent to comply with the International Law norms may also have the influence on other armed groups to agree to comply with such norms.⁶⁴ This kind of influence can also have an impact on the increase of the protection of the civilians during armed conflicts, as well as the protection of the fundamental human rights on the whole.
3. Regarding ANSA’s, if they were given possibility to take part in the development of the international rules, especially those governing armed hostilities, it would be much harder for the States to consider themselves free of any obligation and consequently to apply the most violent measures of repression on ANSA’s.⁶⁵
4. The involvement of the NSA’s in the law-making process at the international level has significance in the growth of the preservation of human rights. In other words, by being able to participate in the International Human Rights Law norms creation and by giving consent to be bound by those norms, NSA’s at the

⁶² Ibidem, p. 127

⁶³ Cedric Ryngaert “Imposing International Duties on Non-State Actors and the Legitimacy of International Law” in “Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers”, ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 69-89, p. 76

⁶⁴ Anthea Roberts and Sandesh Sivakumaran “Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law”, *The Yale Journal of International Law* / Vol. 37/ Issue 01/ 2011, pp. 107-152, p. 127

⁶⁵ Sophie Rondeau “Participation of armed groups in the development of the law applicable to armed conflicts”, *International Review of the Red Cross* / Vol. 93 / No. 883 / 2011, pp. 649-672, p. 655

same time accept the duty to respect human dignity. Moreover, the need of higher protection of human rights may be increased with the number of commitments that NSA's would take during the participation in the international legal norms development.

5. Involving NSA's in the law-creation process would make sure the legitimacy of the norms that create direct international obligations for the NSA's.

Notwithstanding all these possible advantages that involvement of the NSA's in the international law-making process can have, the States still see some disadvantages that such participatory rights of NSA's can have. Such State's doubts are usually based on several concerns. The States assume that permitting such participation would:⁶⁶

1. Affect NSA's legal status. That is, the States treat the inclusion of the NSA's in the international law-making highly controversially. The States indicate that such participatory rights would grant NSA's status that would let them be in a position on a par with the States, i.e. by granting NSA's a law-making role in the international legal level would make NSA's "state-like" entities. Furthermore, this concern is bigger regarding the role of ANSA's in the law-creation process. The States note that acknowledgement of participatory rights of armed non-state actors in the international law-making process would also mean that the States would acknowledge that, for example, terrorists are equal to the States, especially, if such actors have control over the territory or exercise government-like powers. However, granting NSA's (including armed groups) a role in the law-making process does not mean that they will have the same status as the States. Indeed, recognizing that different entities can be the subjects of the International Law does not make them identical to the States, because the subjects of law "[...] in any legal system are not necessarily identical in their nature or in the extent of their rights [...]".⁶⁷ Therefore, the participation of the NSA's in the international law-making should be treated not as the NSA's are being granted the same status as the States, but as the positive action, when all

⁶⁶ Anthea Roberts and Sandesh Sivakumaran "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law", *The Yale Journal of International Law* / Vol. 37/ Issue 01/ 2011, pp. 107-152, p. 132

⁶⁷ Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations Case, ICJ, 1949

interests of all the entities that have certain international rights and obligations are taken into account and that all entities on which the States pose duties are well represented under the international legal level.

2. Lead to the downgrading of the International Law norms. This concern is closely linked to the first one that participatory rights in the law-making process would grant for the NSA's (including armed groups) State alike status. On the contrary, by giving NSA's the possibility to participate in the international law-making process does not mean that NSA's are being given an equal role to that of the States in such process. Moreover, NSA's are not given a possibility to displace or limit their international obligations. Instead, NSA's are given a legal chance to be well represented and to give their consent regarding the norms that create direct international duties to them. Therefore, this is the main reason, why NSA's should be involved in the law-creation, because NSA's actions like actions of any other subject of the International Law have an impact on the international legal system as a whole.

Up to this point, it can be said that these indicated possible disadvantages of the participation of the NSA's in the international law-making process reflect more self-interest of the States rather than the interest of the whole international community. That is, the possible advantages and disadvantages of giving NSA's a role in the law-making must be weighed against each other and should be judged by reference to the needs of the international community.⁶⁸ For this purpose, the States should consider the possible participation of the NSA's in the law-making process under international legal system. Furthermore, the States should also relinquish the idea of the traditional subject doctrine that only States can claim to be subjects of the International Law, because NSA's are simply not State. Therefore, if the States ignore NSA's it does not mean that they (NSA's) will just "disappear".⁶⁹

Indeed, such ignorance of the NSA's by the States only aggravates the possibility for the NSA's to be a part of the international community and to give their consent to be bound by certain international legal norms, as well as to comply to such norms. As a result, NSA's

⁶⁸ Anthea Roberts and Sandesh Sivakumaran "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law", *The Yale Journal of International Law* / Vol. 37/ Issue 01/ 2011, pp. 107-152, p. 140

⁶⁹ Sophie Rondeau "Participation of armed groups in the development of the law applicable to armed conflicts", *International Review of the Red Cross* / Vol. 93 / No. 883 / 2011, pp. 649-672, p. 650

usually accept international obligations, if they have something to gain from this acceptance and, at the same time, NSA's are usually willing to participate in the law-creation, if such participation will have benefits for them.⁷⁰ Such situation, when the States are simply ignoring NSA's and when NSA's are simply looking for certain benefits from participation in the international legal system, is not well promising for the whole international community. It is important to emphasize that the creation and development of the international legal system rests with all members of the international community. In the same vein, the participation of the NSA's in the international norm creation depends not only on their will to participate in such process, but it also depends on the other actors in the law-making. For this reason, all members of the international community, including NSA's (and ANSA's) should accept each other's legal positions and interests in order for the law-creation process to be successful.

Regarding what have been mentioned before, it can be said that the international law-making and law-enforcement process have become multi-layered⁷¹ and the number of actors involved has increased greatly. Moreover, NSA's have also demonstrated that their interests and actions, as well as decisions have the influence on the international law-creation process and that NSA's role, on the whole, in the international legal system is important and can not be ignored. However, this kind of NSA's influence on the international legal norms development does neither grant them the status of the international law-makers nor endow them law-making powers. That is, notwithstanding NSA's influence, the States remain the exclusive international law-makers.⁷² Of course, NSA's can have certain importance in the creation of the new legal norms and the other participants of the international legal system have to pay attention to NSA's interests, especially when putting international obligations on them. For this reason, NSA's instead of being treated as law-makers (because the States do not agree on this kind of view and the participation of the NSA's in the law-making process see highly controversial, because of the possibility that NSA's would become state-like entities,

⁷⁰ Cedric Ryngaert "Imposing International Duties on Non-State Actors and the Legitimacy of International Law" in "Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers", ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 69-89, p. 76

⁷¹ Jean d'Aspremont "International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?" in "Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers", ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 171-194, p. 171

⁷² *Ibidem*, p. 178

although there are no reasons for such doubts as it was argued in the text before), they should be rather seen as the law-takers or the law-consumers.

It is important to explain that the definitions “the law-taker” and “the law-consumer” are seen from different perspectives in this master thesis. The definition “law-taker” is narrower than the definition “law-consumer”.⁷³ That is, the term “law-taker” is seen as NSA’s would only accept norms that create international obligations for them and only obey such norms without any other importance in the international legal system, i.e. NSA’s are given certain rights and duties and they simply enjoy those rights and comply with those duties. For this purpose, NSA’s should be treated as the international law-consumers seeing the word “consumer” from that perspective that the consumers not only take what they are given (in this context that would be certain international obligations), but also have the importance in the production of those goods that they are being given. In other words, NSA’s not only have certain international rights and obligations, but also play an important role in the creation and the development of those rights and obligations, as well as for the legitimacy of norms from which those rights and duties rise.

Additionally, although the law-making status of the NSA’s is limited, they should be given the possibility to know international regulatory instruments in order to be well represented in the international legal system. Moreover, regarding the fact that the NSA’s actions and decisions have the influence on the States policy and practice, the States should not ignore NSA’s role in the international law-creation process. Therefore, since NSA’s, as the law-consumers, have an impact on the interests of the whole international community, their complicity in the international norm creation process should preeminently be treated as policy-making and not as the law.⁷⁴

Up to this point, it can be said that:

1. Non-state actors do matter in the international legal system. That is, NSA’s play an increasingly eminent role in the international law-making process and the decisions, which are made during that process, affect and create international

⁷³ The estimation of the author of the Master Thesis

⁷⁴ Math Noortmann and Cedric Ryngaert “Non-State Actors: Law-Takers or Law-Makers? Is That the Question?” in “Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers”, ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 195-202, p. 198

duties for the NSA's. Therefore, the States can no longer ignore (or deny) the importance that NSA's have to the international community.

2. It is important to include NSA's in the international legal norms creation process in order for those norms to be legitimate, especially when such norms create certain international duties for the NSA's.
3. International law-making process and law-consumption go undoubtedly hand-in-hand.⁷⁵

2.2. The obligations of the non-state actors under Human Rights Law:

There are a wide variety of activities and actions committed by the non-state actors that have a severe effect on human rights. This shows that NSA's play an important role in maintenance and protection of fundamental human rights. Moreover, NSA's can either protect or violate human rights and fundamental values that are acknowledged by the whole international community. Although this may be true, only State parties to human rights treaties have obligations to respect, protect and fulfil (promote) the human rights of individuals (who are NSA's) within their jurisdiction. This means that human rights treaties are signed and ratified between States that have the obligation to maintain and guarantee human rights, while individuals (NSA's) have rights that are only conferred and guaranteed by the States, i.e. international human rights treaties do not create obligations under the International Law for NSA's. Furthermore, such nuisance shows that the human rights regime has developed along the States and the accountability for the fundamental human rights violations is based on the traditional rules of the State responsibility.⁷⁶ However, as it was argued in the text before, the state-centric approach is no longer able to provide a satisfactory account of the social realities underlying the International Law, especially Human Rights Law. Therefore, the effective protection of human rights requires looking beyond the States. That is, monitoring and the development of the protective mechanisms should be extended regarding interaction of all

⁷⁵ Jean d'Aspremont "International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?" in "Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers", ed. Math Noortmann and Cedric Ryngaert, Ashgate, Farnham, 2010, pp. 171-194, p. 187

⁷⁶ Andrew Clapham "Non-State Actors" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 3-24, p. 4

members of the international community rather than only within the State's territory⁷⁷, because all entities have the influence on the protection of human rights, as well as on each other's actions in the international legal system.

Indeed, from the victims' perspective the violation of their fundamental human rights is an offence against human dignity, whether it is committed by the State or by the NSA's or by any other actor. Regardless, the state-centric approach and the ignorance of the importance of the NSA's role in the international plane leads to the situation, when actions of any other entity than the State, despite the severe impact that those actions may have on human rights, are not treated as a violation of HRL norms.⁷⁸ This also leads to the conclusion that NSA's do not have any obligations under HRL, because the international human rights treaties create obligations only for the States. Notwithstanding, this is not true – NSA's as any other member of the international community have certain international duties under HRL and only state-centric approach to HRL norms aggravates the applicability of such norms to the NSA's.

One of the biggest problems is that the actions of the NSA's that violate human rights are not considered to be a violation of human rights law due to the structure of that law⁷⁹, i.e. regarding the fact that HRL norms create obligations only for the States. Indeed, the unlawful acts of the NSA's are usually attributed to the States⁸⁰ and then those acts become the acts of the State, and, as a result, the State becomes responsible for such act and not the NSA. Therefore, it can be said that NSA's are treated like their actions can not violate human rights. This leads to another conclusion that such treatment excludes a lot of human rights violations from the direct protection of HRL, as well as from the direct applicability to the NSA's for their international human rights law norms violations.

Additionally, HRL creates for the NSA's vertical obligations rather than horizontal obligations. That is, the States have direct obligations under HRL (horizontal obligations) and NSA's have to obey the norms that the State lets down on them by signing and ratifying international human rights treaties (vertical obligations). However, it can be argued that

⁷⁷ Zehra F. Kabasakal Arat "Looking Beyond the State, but not Ignoring It. A Framework of Analysis for Non-State Actors and Human Rights" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 25-43, p. 28

⁷⁸ Robert McCorquodale "Non-state actors and international human rights law" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 69-86, p. 69

⁷⁹ Ibidem, p. 69

⁸⁰ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Chapter II, enacted 2001-11-01

human rights norms operate on three levels – as the rights of individuals, as obligations taken by the States, and as legitimate expectations of the international community.⁸¹ Furthermore, human rights are each person's inherent dignity and such natural rights should be respected and protected by everyone. Therefore, although NSA's may not have legal obligations under the international human rights treaties, but they still remain the subject to the demand of the international community, all the more because NSA's participate in the international legal system by making influence on the creation of the international legal norms, as well as on HRL norms.

Also, the Universal Declaration of Human Rights (Universal Declaration) indicates that every organ of society respects and promotes human rights.⁸² Indeed, two passages of the Universal Declaration are cited as a proof that this declaration creates human rights obligations for the NSA's.⁸³ That is, the Universal Declaration preamble's paragraph 8, which states that “[...] *every individual and every organ of society [...] shall [...] promote respect for these [human] rights and freedoms [...]*” and Article 29 (1) that “*Everyone has duties to the community in which alone the free and full development of his personality is possible*”. Actually, although the word “State” or “State party” do not appear in these provision (as well as in the Universal Declaration on the whole), it does not yet mean that the Universal Declaration has created direct obligation for the NSA's regarding human rights.⁸⁴ That is, these provisions should not be interpreted as imposing direct obligations on the NSA's to refrain from committing acts that would be treated as violations of human rights, on the contrary, it is more a duty to promote respect for the fundamental human rights and to secure their observance.⁸⁵ However, it cannot also be said that the Universal Declaration is without significance concerning the protection and promotion of human rights by the NSA's. Article 1 of this declaration indicates that “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a*

⁸¹ Andrew Clapham “The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement”, Geneva Academy of International Humanitarian Law and Human Rights, Draft for comment, February 2010, pp. 1-45, p. 27

⁸² The Universal Declaration of Human Rights, preamble, para. 8, adopted 1948

⁸³ Jan Arno Hessbruegge “Human Rights Violations Arising from Conduct of Non-State Actors” in “Human Rights and Non-State Actors”, ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 87-154, p. 100

⁸⁴ Nigel S. Rodley “Can Armed Opposition Groups Violate Human Rights?” in “Human Rights and Non-State Actors”, ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 833-854, p. 843

⁸⁵ Ibidem, p. 841

spirit of brotherhood". This provision creates general obligation for all the members of the international community to respect, secure and promote the fundamental human rights. Therefore, NSA's do have certain obligations under HRL.

Of course, limiting human rights obligations only to the States would not satisfy the object and purpose of human rights. In other words, HRL aim is to protect individuals and groups from oppressive power primarily in the context of the communities within which they live and that oppressive power can come from any source – it could be the State or the NSA's – and can be not only political power, but also economical, social or any other type of power.⁸⁶ For this reason, the Security Council has called upon various groups that States do not recognize as having the capacity to formally assume international obligations to respect human rights.⁸⁷ Additionally, there is more obscurity about implying HRL obligations to the ANSA's.

And yet, international human rights principles are increasingly considered to be applicable to the armed non-state actors. Indeed, if ANSA's can have obligations under IHL, they should also be able to have obligations under HRL. For example, the Optional Protocol to the Convention on the Rights of the Child indicates that armed groups, which are not armed forces of a State, "*should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years*".⁸⁸ Yet, the article does not create a strict obligation for the ANSA's, i.e. the article instead of strict language uses the word "should". Although, this still indicates that ANSA's have certain human rights obligations. Besides, the distinguished expert body the Institute of International Law at its resolution stated that ANSA's, irrespective of their legal status, have the obligation to respect not only IHL, but fundamental human rights as well.⁸⁹ Moreover, Article X of the mentioned resolution also indicates that, if certain internal disturbances and tensions are not covered by IHL, "[...] *individuals remain under the protection of international law guaranteeing fundamental human rights*" and "*all parties are bound to respect fundamental rights under the scrutiny of the international community*".⁹⁰

⁸⁶ Manisuli Ssenyonjo "The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 154-190, p. 169

⁸⁷ For example, the Security Council Resolutions 1193, 1214, 1216, 1471, 1479, 1509 and etc.

⁸⁸ The Optional Protocol to the Convention on the Rights of the Child, Article 4(1), enacted 2000-05-25

⁸⁹ The Institute of International Law "The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties", resolution adopted at the Berlin Session, 25 August 1999, Article II

⁹⁰ Ibidem, Article X

Therefore, it can be said that, although HRL does not lay direct duties on the ANSA's, the main purpose of the International Law to maintain peace and security within the international community rises obligations for ANSA's under HRL, at least at the minimum level, regarding the fact that every human being has fundamental human rights guaranteed and protected in both levels – international and national.

Considering what has been mentioned before, it is apparent that the international obligations of ANSA's (and NSA's on the whole) are limited to the duty to respect elementary norms of humanity. In other words, there is no doubt that non-state actors are prohibited from killing, torturing and otherwise inflicting inhumane treatment. Moreover, NSA's like any other member of the international community have the general obligation to maintain peace and security within such community. Therefore, it can be said that one cannot have rights without duties.

Although this may be true, international norms, including HRL norms, applicable to ANSA's are formulated more as prohibitions.⁹¹ That is, international bodies have accepted the applicability of a wide range of international norms to ANSA's, but they have rarely indicated which measures these groups must take in order to be in compliance with these norms.⁹² It was more concentrated on what NSA's should not do rather than how and what measures NSA's should (or must) take in order to be able to implement their international duties in the international legal system. For this purpose, NSA's are left only with general obligations under HRL and without clear status from the point of view of international legal norms.

In short:

1. NSA's have human rights obligations (at least general international duties like the rest of the international community has, for example, the obligation to protect the right to life, the right to health, the right of freedom of movement and etc.), however, HRL does not impose direct obligations on the non-state actors. States are still considered to be the main bearers of obligations to respect, to protect and to fulfil fundamental human rights. Although, such view do not satisfy the object and purpose of human rights.

⁹¹ Liesbeth Zegveld "The Accountability of Armed Opposition Groups in International Law", Cambridge University Press, 2002, p. 92

⁹² Ibidem, p. 92

2. Regarding the fact that, in order for the States to implement the main obligations they have under HRL (to respect, to protect and to fulfil human rights), the States must take certain measures and to make sure that other members of the international community, including NSA's, respect and do not violate human rights, leads to the conclusion that NSA's may violate human rights and at the same time this means that NSA's do have certain international obligations under HRL.
3. NSA's have to respect States' human rights obligations and to refrain from acts or omissions that violate human rights.
4. ANSA's should be equally obliged to respect and do not violate human rights, because they have an impact on the protection and development of fundamental human rights in the international legal system on the whole.

3. The responsibility of the non-state actors under Human Rights Law

3.1. The possibility of the direct responsibility of the non-state actors for the human rights violations:

Responsibility of the non-state actors under International Human Rights Law is one of the most critical challenges facing international legal system today. According to the traditional theory of subjects, the International law is said to be primarily concerned with the rules of the State behavior and these standards, which include fundamental human rights, can only be violated by the State officials, therefore, the violations committed by the private actors fall within the purview of the ordinary national law.⁹³ In other words, under traditional approaches to human rights, non-state actors are beyond the direct reach of the International Human Rights Law.⁹⁴ They cannot be parties to the relevant treaties and so they are only bound to the extent that obligations accepted by the States can be applied to them by the governments. The result is that NSA's are generally considered not to be bound directly by Human Rights Law.⁹⁵ And yet, does this mean that NSA's can ignore human rights as long as the governments do not hold them accountable? The answer should be negative.

Although HRL do not impose direct obligations on the non-state actors, they do have duties regarding the protection and the maintenance of the fundamental human rights, which is the concern of the whole international community. That is, all the members of the international community have legitimate expectations of each other to protect and develop human rights. Moreover, everyone has a general obligation not to violate human rights and at the same time *"Everyone is entitled to all the rights and freedoms [...] without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*.⁹⁶ For this purpose, NSA's not only have obligations under HRL, but also they have responsibility for violations of HRL norms. In other words, everyone, including NSA's, has the obligation to respect and not to violate fundamental human rights.

⁹³ Silvia Danailov "The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations", Geneva, October 1998, pp. 1-74, p. 32

⁹⁴ Philip Alston "Non-State Actors and Human Rights", Oxford: Oxford University Press, 2005, p. 82

⁹⁵ Ibidem, p. 82

⁹⁶ The Universal Declaration of Human Rights, Article 2, adopted 1948

Of course, duty usually goes hand in hand with the responsibility. Responsibility is something that one has to do as a duty, which must be fulfilled and which has a consequent penalty for failure.⁹⁷ That is, the violation of the fundamental human rights or the failure to prevent such violation raises responsibility under HRL. Nevertheless, more problems, regarding the accountability under HRL, occur with ANSA's. Additionally, the International Court of Justice has indicated that International Human Rights Law also applies in situations of armed conflicts, whether international or of a non-international character.⁹⁸ This means that ANSA's must comply not only with IHL norms, but with HRL norms as well.

Moreover, even though it is difficult to establish direct legal human rights obligations of ANSA's, there is a broader agreement that armed groups could be bound by HRL when they exercise element of governmental functions and have de facto authority over a population.⁹⁹ This will normally be the case when an armed group controls a certain portion of the territory.¹⁰⁰ The need to regulate the relationship between those who govern and those who are governed would justify the application of that body of law.¹⁰¹ In other words, contrary to IHL, which rules require armed groups to respect certain norms in their position as a military authority, HRL demands from ANSA's that they operate as a responsible political authority governing territory and population.¹⁰² Therefore, in such situation, there would be a possibility of direct responsibility of ANSA's for violations of HRL norms.

Furthermore, Article 10 of the Draft Articles on State Responsibility indicates that *"the conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law"*. Also, Human Rights Committee stated that *"[...] once the people are accorded the protection of the rights [...] such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State*

⁹⁷ World English Corpus "Macmillan essential dictionary for learners of English", Macmillan Publishers Limited, England, 2003

⁹⁸ For example, the International Court of Justice Nuclear Weapons Advisory Opinion, 1996, as well as the Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004, the International Court of Justice Reports 2004

⁹⁹ Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen "International law and armed non-state actors in Afghanistan", International Review of the Red Cross, Volume 93 / Number 881 / March 2011, pp. 47-79, p. 69

¹⁰⁰ Ibidem, p. 69

¹⁰¹ Annyssa Bellal and Stuart Casey-Maslen "Enhancing Compliance with International Law by Armed Non-State Actors", Goettingen Journal of International Law 3 (2011) 1, pp. 175-197, p. 187

¹⁰² Liesbeth Zegveld "The Accountability of Armed Opposition Groups in International Law", Cambridge University Press, 2002, p. 149

succession [...]”.¹⁰³ Therefore, it can be said that human rights obligations bind the territory¹⁰⁴, i.e. ANSA's that control territory (or the certain part of the territory) are bind by the human rights obligations that are taken and are running in that territory, because ANSA's at this point are treated as authority governing territory and population, and the need to ensure the safety and protection of the population still holds true.

However, some problems arise regarding this theory:

1. First of all, there is no clear legal source indicating, what level of “authority” or “control” over a population is required in order to impose human rights obligations on ANSA's.¹⁰⁵ Furthermore, ANSA's usually exist only temporary and, therefore, they do not become a new authority (or government) and, at the same time, for this reason ANSA's legal personality is of the limited nature¹⁰⁶, i.e. ANSA's are either suppressed by the State, or they seize power and establish themselves as the new government, or they secede and join another State, or create a new State, and, for this purpose, it can be said that ANSA's cannot possess rights based on the permanent nature of international actors.¹⁰⁷ This means that ANSA's only exercise de facto authority over the territory and the population. This kind of “authority” aggravates the possibility to hold ANSA's directly responsible for the human rights violations, because ANSA's lacking effective power are unlikely to be able to comply with the human rights norms, since they lack the minimum infrastructure required for their implementation.¹⁰⁸
2. Next, the States do not wish to attribute government-like qualities to NSA's, especially to ANSA's. The States argue that recognizing international legal personality of ANSA's would also mean recognizing the existence of another authority within the State's territory. For example, pro-Russian separatists that are now acting in the eastern Ukraine have established two separate from

¹⁰³ Office of the High Commissioner for Human Rights, General Comment No. 26: Continuity of obligations: 08/12/97, CCPR/C/21/Rev.1/Add.8/Rev.1

¹⁰⁴ Jan Arno Hessbruegge “Human Rights Violations Arising from Conduct of Non-State Actors” in “Human Rights and Non-State Actors”, ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 87-154 , p. 106

¹⁰⁵ Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen “International law and armed non-state actors in Afghanistan”, International Review of the Red Cross, Volume 93 / Number 881 / March 2011, pp. 47-79, p. 71

¹⁰⁶ Liesbeth Zegveld “The Accountability of Armed Opposition Groups in International Law”, Cambridge University Press, 2002, p. 152

¹⁰⁷ Ibidem, p. 152

¹⁰⁸ Ibidem, p. 134

Ukraine republics: the Donetsk and Lugansk People's Republics. However, neither these separatists nor their established republics are internationally recognized. Additionally, separatists have also arranged elections, in order to choose their chief executives and parliaments.¹⁰⁹ Once again, neither the European Union nor the United States of America have recognized the elections (which violate the terms of the Minsk Protocol, according to which local elections in the areas occupied by the separatists were supposed to be held on 7 December, in accordance with Ukrainian law).¹¹⁰ Therefore, this example shows that the States are not willing to acknowledge the legitimacy of the ANSA's authority over the part(s) of the territory, as well as that ANSA's are operating in ways which are akin to governments. Therefore, this leads to the conclusion that ANSA's are incapable of protecting human rights, regarding the view that HRL establishes the relationship between the governments and population.¹¹¹

3. Another difficulty is that there are no judicial or quasi-judicial mechanisms specifically competent to examine claims against armed opposition groups.¹¹² In the same vein, the situation on who has standing to bring a claim, and, who is entitled to represent armed opposition groups in a claim or at arbitration is vague as well. For this reason, it would be difficult to hold ANSA's directly responsible for the violations of the fundamental human rights during their unlawful activities.

Nevertheless, despite these problems, ANSA's could still be legally bound by core human rights norms whether or not there is control over a certain territory or a level of a de facto authority over a population.¹¹³ In other words, although ANSA's do not incur direct human rights obligations under HRL, ANSA's would still be bound by *jus cogens* norms. Indeed,

¹⁰⁹ Date of elections in Donetsk, Luhansk People's republics the same - November 2, <http://en.itar-tass.com/world/753919> [accessed 5 November 2014]

¹¹⁰ EU not to recognize elections organized by DPR and LPR, <http://en.interfax.com.ua/news/general/230608.html> [accessed 5 November 2014]

¹¹¹ Lyndsay Moir "The Law of Internal Armed Conflict", Cambridge University Press, Cambridge, 2002, pp. 58-61

¹¹² Liesbeth Zegveld "The Accountability of Armed Opposition Groups in International Law", Cambridge University Press, 2002, p. 162

¹¹³ Annysa Bellal and Stuart Casey-Maslen "Enhancing Compliance with International Law by Armed Non-State Actors", Goettingen Journal of International Law 3 (2011) 1, pp. 175-197, p. 187

there is an almost intrinsic relationship between *jus cogens* and human rights.¹¹⁴ For this reason, it can be said that peremptory human rights norms could be treated as projections of the individual and collective conscience, i.e. human rights norms materialize as a powerful collective belief of the whole international community.¹¹⁵ That is, *jus cogens* norms reflect the developing interests of the international community as a whole, not the narrow interests of a particular State, therefore, peremptory norms protect the fundamental values of the international community.¹¹⁶ Furthermore, the relation between *jus cogens* and human rights was developed in the dissenting opinion of Judge Tanaka in the South West Africa case, where the judge indicated that “[...] *jus cogens*, a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*”.¹¹⁷ Additionally, paragraph 4 (Part I) of the Vienna Declaration and Program of Action states that: “*The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective [...] in accordance with [...] international cooperation. [...] the promotion and protection of all human rights is a legitimate concern of the international community*”.¹¹⁸ For this purpose, it can be said that *jus cogens* is the reflection of the values within the international community, i.e. these norms are connected to the interest and system of values of the whole international community.

Moreover, even though it has not been settled, which human rights norms are part of *jus cogens* norms, the International Law Commission has indicated that peremptory norms, which are clearly accepted and recognized by all the international community, include “[...] *the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination*”.¹¹⁹ Further, The United Nations Human Rights Committee has also identified the following acts that would violate *jus cogens* norms:

¹¹⁴ Andrea Bianchi “Human Rights and the Magic of Jus Cogens”, The European Journal of International Law, Vol. 19 no. 3, EJIL, 2008, pp. 491-508, p. 491

¹¹⁵ Ibidem, 491

¹¹⁶ Predrag Zenovic “Human rights enforcement via peremptory norms – a challenge to state sovereignty”, RGSL Research Papers, No. 6, 2012, pp. 1-65, p. 26

¹¹⁷ Opinion of the Judge Tanaka Dissenting in the South West Africa case (Ethiopia v. South Africa; Liberia v. South Africa), Judgment, 1966, ICJ

¹¹⁸ The Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights on 25 June 1993, Part I, paragraph 4

¹¹⁹ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, in Yearbook of the International Law Commission, 2001, Vol. 2, Part Two, Article 26

arbitrary deprivations of life, torture and inhuman or degrading treatment, taking hostages, imposing collective punishments, arbitrary deprivations of liberty, and deviating from fundamental principles of fair trial, including the presumption of innocence.¹²⁰ In other words, these mentioned acts (although the given list may be revised) violate the most basic human rights: the right to life, the right to health and the right to freedom. For this purpose, these natural rights should be respected by everyone and every entity – this means including ANSA's as well.¹²¹

Of equal importance, despite legal uncertainties and regarding the fact that ANSA's have an important role in implementing, as well as in violating fundamental human rights, there is a need to hold such entities directly responsible for HRL norms violations. Such inclusion of ANSA's in compliance with HRL norms is important, because:¹²²

1. Civilian population must be protected against the threats posed by ANSA's in the areas beyond the control of the State.
2. International humanitarian law rules which bound ANSA's do not always cover all the issues during armed conflicts, especially regarding the everyday life of people living in areas under the control of ANSA's, therefore ANSA's should also be bound by HRL norms.
3. When it comes to the protection of core human rights and dignity, it does not matter in the eyes of the victims whether the violation has been committed by the state or by a non-state actor.

Regarding what has been mentioned, it can be said that human rights should be respected, protected and developed by the NSA's as well. Moreover, the respect and implementation of the human rights should be seen as the respect of the basic HRL standards and principles, rather than just as the violations of binding legal obligations on NSA's.¹²³ Nevertheless, the international community has also expressed a need to hold NSA's (especially ANSA's) accountable for the violations committed against the civilian population,

¹²⁰ The United Nations Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001

¹²¹ The further development of this topic on the relationship between *jus cogens* norms and HRL norms is beyond the scope of this Master Thesis

¹²² Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen "International law and armed non-state actors in Afghanistan", International Review of the Red Cross, Volume 93 / Number 881 / March 2011, pp. 47-79, p. 74

¹²³ Ibidem, p. 68

concerning the influential role that NSA's play in the creation and the development of the international legal norms and at the international legal system on the whole.¹²⁴ In other words, fundamental human rights should be respected by everyone. Furthermore, the obligations to respect, to protect, and to fulfil developed by United Nations human rights treaty bodies for the State parties could be used as a valuable conceptual framework for the analysis of the extent of the human rights obligations of the NSA's¹²⁵ and the possibility of their direct responsibility for human rights violations under HRL.

On the whole, it can be emphasized that:

1. Although HRL do not impose direct obligations on the non-state actors, they do have duties regarding the protection and maintenance of the fundamental human rights, which is the concern of the whole international community. That is, the influence of the NSA's on the security of the core rights of every human being is too great to ignore it. Therefore, the direct responsibility for the violations of human rights should be imposed on the NSA's (including ANSA's).
2. Despite legal uncertainties, ANSA's that have de facto authority over the territory or the population should be bound by HRL norms and be held responsible for the failure to respect and secure human rights in the areas under their control.
3. The basic obligations under HRL: the obligation to respect, to protect and to fulfil fundamental human rights, should be also implemented by the NSA's (especially ANSA's that have control over certain part of the territory), in order to enhance the compliance with HRL norms by the NSA's.
4. As long as the States do not want NSA's to be directly accountable for the fundamental human rights violations, they will not become accountable. When the States want NSA's to become directly responsible for such grave violations, the States could achieve this by establishing required judicial or quasi-judicial mechanisms and procedures.¹²⁶

¹²⁴ Sandesh Sivakumaran "Binding armed opposition groups" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 855-880, p. 859

¹²⁵ Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen "International law and armed non-state actors in Afghanistan", *International Review of the Red Cross*, Volume 93 / Number 881 / March 2011, pp. 47-79, p. 71

¹²⁶ Philip Alston "Non-State Actors and Human Rights", Oxford: Oxford University Press, 2005, p. 87

5. The interpretation of the different international human rights standards should focus more on the effective protection of the rights of the individuals, rather than on the entities from which these rights have to be protected.¹²⁷

3.2. Responsibility of the non-state actors through the State's obligations under Human Rights Law:

As it was argued in the previous subsection, direct accountability of the NSA's is not yet developed under Human Rights Law, as well as under the International Law in general. Though, the responsibility (in general) for violations of the fundamental human rights is not wholly excluded and the increasing awareness of the whole international community that NSA's should be bound (directly) by human rights obligations is recognized.¹²⁸ Furthermore, even though there are difficulties in establishing direct legal human rights obligations and responsibilities of NSA's, there is still a possibility to hold NSA's responsible for the violations of HRL norms and standards through the State's obligations under HRL.

The States distinguish themselves from NSA's by their power to create and enforce law (the exception could be made regarding armed groups exercising element of governmental functions and having de facto authority over the territory or the population; such NSA's could be bound by human rights obligations like the States).¹²⁹ In the same vein, what regards HRL, it can be said that human rights are those rules, which mediate the relationship between, on the one hand, governments or other entities exercising effective power analogous to that of the governments and, on the other hand, those who are subjects to that power¹³⁰, i.e. HRL norms control the relationship between the governors and the subjects. For this purpose, international human rights treaties place an obligation on the State parties to adopt legislation or other measures in order to ensure and realize the fundamental human rights indicated in those

¹²⁷ Silvia Danailov "The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations", Geneva, October 1998, pp. 1- 74, p. 38

¹²⁸ Philip Alston "Non-State Actors and Human Rights", Oxford: Oxford University Press, 2005, p. 82

¹²⁹ Jan Arno Hessbruegge "Human Rights Violations Arising from Conduct of Non-State Actors" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 87-154, p. 105

¹³⁰ Nigel S. Rodley "Can Armed Opposition Groups Violate Human Rights?" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 833-880, p. 836

international human rights treaties.¹³¹ To put it differently, the States have (general) obligation to protect and prevent the violations of the human rights by all persons within its jurisdiction.¹³²

Additionally, it is clear that international human rights treaties are principally addressed to the States and that the NSA's cannot (at least now) be parties to the existing human rights treaties.¹³³ For this reason and concerning the fact that all the State parties¹³⁴ to the human rights treaties have three basic obligations under HRL: to respect, to protect and to fulfil the fundamental human rights, the actions of the NSA's that violate international obligations of the State under HRL may be attributed to that State. In other words, Article 2 of the Draft Articles on State Responsibility notes that one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under the International Law. However, in theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the government.¹³⁵ Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State¹³⁶, or the State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. Therefore, the International Law Commission in the Draft Articles on State Responsibility indicated several situations, when the act of the other entity can be (or is) treated as an act of the State:

1. The conduct of any State organ shall be considered an act of that State (Article 4);

¹³¹ Robert McCorquodale "Non-state actors and international human rights law" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 69-86, p. 77

¹³² Ibidem, p. 77

¹³³ Manisuli Ssenyonjo "The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp.155-190, p. 156

¹³⁴ All the States are parties to at least one of the human rights treaties

¹³⁵ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, in Yearbook of the International Law Commission, 2001, Vol. 2, Part Two

¹³⁶ Ibidem

2. The conduct of a person or entity which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State (Article 5);
3. The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State, if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed (Article 6);
4. The conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions (Article 7);
5. The conduct carried out on the instructions of a State organ or under its direction or control (Article 8);
6. The conduct carried out in the absence or default of the official authorities (Article 9);
7. The conduct of insurrectional movements, when such movement becomes a new government or establishes a new State (Article 10);
8. Conduct acknowledged and adopted by a State as its own (Article 11).

It can also be added that the State may become responsible for the human rights violations, if there was a complicity in the activity of the NSA's or the State fails to prevent the unlawful acts of the NSA's¹³⁷, which leads to the violation of the international obligation of the State under HRL. As a result, regarding the fact that the State can be held responsible for the unlawful acts committed by the NSA's and the fact that the State has an obligation to ensure protection and security of the fundamental human rights by all the entities within its jurisdiction, it can be said that there is a possibility for the NSA's to be bound by HRL through the State's obligations under this field of law.

That is, when the State becomes a party to the international human rights treaty and ratifies it, the State does so not just on behalf of its own, but also on behalf of all the individuals within the State's territory (the principle of legislative jurisdiction).¹³⁸ In other

¹³⁷ Robert McCorquodale "Non-state actors and international human rights law" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 69-86, p. 75

¹³⁸ Sandesh Sivakumaran "Binding armed opposition groups" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 855-880, p. 867

words, human rights treaty, which is ratified by the State, also binds NSA's and the human rights obligations indicated in that treaty must be implemented not only by the State party, but also by the NSA's, that are within the jurisdiction of that State, because the rights and duties of the State is, at the same time, the rights and duties of the people that create the State.¹³⁹ For this purpose, it can be said that, one of the ways to held NSA's accountable under HRL is by incorporating human rights treaty rights and duties into the State's national legal system, which also means that human rights obligations could apply to the NSA's even in the absence of the special legislation.¹⁴⁰

The other possible way could be allowing human rights claims against NSA's within the jurisdiction of the State party. However, as it was mentioned in the previous subsection, it could be problematic to do this regarding ANSA's, because there are no judicial or quasi-judicial mechanisms specifically competent to examine claims against armed opposition groups. Nevertheless, in cases not covered by the law in force, the civilians remain under the protection of the general principles.¹⁴¹ That is, even though ANSA's are not directly bound by HRL, they are bound by IHL rules and general principles, therefore, during the armed conflict ANSA's should comply with such principles as: humanity, distinction, proportionality, necessity, as well as the prohibition on the infliction of unnecessary suffering and etc.

Besides, what also regards ANSA's, when a government ratifies the international human rights treaty, the ratification binds the State and not just the particular ratifying government. Therefore, treaties that are already in force also bind incoming governments regardless of their status prior to becoming the government.¹⁴² This means that such treaties as well bind ANSA's that become a new government, even though they (ANSA's) were previously rebelling against the government that has ratified those treaties.¹⁴³ This conclusion is linked to the fact that ANSA's that become a new government from that moment have authority over the territory and population, thus, have the obligation to ensure and secure the fundamental human rights of that population.

¹³⁹ Bearing in mind that all the individuals are the nationals of some kind of State

¹⁴⁰ Andrew Clapham "Non-State Actors" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp. 3-24, p. 9

¹⁴¹ Sandesh Sivakumaran "Binding armed opposition groups" in "Human Rights and Non-State Actors", ed. by Andrew Clapham, Edward Elgar Publishing, 2013, pp.855-880, p. 862

¹⁴² Ibidem, p. 865

¹⁴³ Ibidem, p.865

Further, the other possible way to bind ANSA's, under HRL through the State's human rights obligations could be the bilateral agreements between ANSA's and the State against which it is in armed conflict.¹⁴⁴

Eventually, there are certain international human rights treaties (conventions) that create rights and obligations upon individuals directly upon their ratification by the State irrespective of whether or not such treaties (conventions) have been incorporated into national law. For example, the Convention on the Prevention and Punishment of the Crime of Genocide or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the human rights obligations indicated in these conventions bind all the State parties and all the individuals within their jurisdiction, as well as all the other entities, including NSA's, and all other members of the international community.

Up to this point, it could be said that:

1. Regarding the fact that the ratification of the international human rights treaties bind not only the State party, but individuals within its territory as well, NSA's could be held responsible for the violations of the fundamental human rights through the State's obligations under Human Rights Law.
2. Incorporating the international human rights treaties rights and duties into the State's national legal system enhance the compliance with HRL norms by NSA's.
3. In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the government.
4. Regarding the fact that the State can be held responsible for the unlawful acts committed by the NSA's it can be said that there is a possibility for the NSA's to be bound by HRL through the State's obligations under this field of law.
5. When the State becomes a party to the international human rights treaty and ratifies it, the State does so on behalf of all the individuals within the State's territory as well (the principle of legislative jurisdiction).

¹⁴⁴ This was explained in the Chapter II, subsection 2.1.: Creating rights and obligations for the non-state actors

Conclusion

The research made in this Master thesis showed that there is no clear establishment of the international legal personality of the non-state actors. That is, there are no clear criteria under which international legal personality and the status of NSA's as subjects of the International Law could be determined. Moreover, the obligations and responsibilities of NSA's, especially of ANSA's, under Human Rights Law are also vague. For this purpose, the findings are as follows: firstly, growing influence of the NSA's in the international legal process raises the need of redefining the boundaries of international legal system concerning the ability to participate in international plane for the other entities, such as NSA's. That is, the promotion and the protection of the fundamental human rights and freedoms should be the goal of all international community.

Moreover, the traditional subject doctrine is no longer able to provide a satisfactory account of the social realities underlying the International Law. For this reason, NSA's, especially ANSA's, can no longer be ignored in the international legal system. Additionally, it is important to include NSA's in the international legal norms creation process in order for those norms to be legitimate, especially when such norms create certain international duties for the NSA's.

Although Human Rights Law does not impose direct obligations on the non-state actors and the States are still considered to be the main bearers of obligations to respect, to protect and to fulfil fundamental human rights, the influence of the NSA's on the creation and development of human rights norms is rising greatly.

Of equal importance, the direct responsibility for the violations of human rights should be imposed on the NSA's (including ANSA's), regarding NSA's influence on the protection and maintenance of the fundamental human rights. In the same vein, despite legal uncertainties, ANSA's that have de facto authority over the territory or the population should be bound by HRL norms and be held responsible for the failure to respect and secure human rights in the areas under their control. This is important, because at this point are treated as authority governing territory and population, and the need to ensure the safety and protection of the population still holds true.

Finally, NSA's could be held responsible for the violations of the fundamental human rights through the State's obligations under Human Rights Law. That is, the ratification of the international human rights treaties bind not only the State party, but individuals within its territory as well, because human rights obligations are treated as binding the whole territory of the State party.

To sum up, NSA's (including ANSA's) do have certain international obligations and responsibilities under the International Human Rights Law.

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